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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

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No. 1737

BOARD OF EDUCATION OF PRINCE GEORGE'S COUNTY, ET AL.,

Petitioners,

v.

SYLVESTER J. VAUGHNS, JR., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINION BELOW

The opinions below are adequately set forth in the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

Petitioners' Petition contains no statement of the Questions presented for review, despite the requirements of Rule 23 (1) (c) of the Rules of this Court which provides that

"The Petition for Writ of Certiorari shall contain . . . (c) the questions presented for review."

However, in that portion of the Petition entitled "Remaining Issues" (P. 24),[1] it is stated, with reference to the many issues raised by Petitioners below: "Petitioners do not renew such other questions for consideration in this petition . . . [T]here is very much alive as a legal issue the questions relating to the granting of Summary Judgment under the circumstances presented hereinbefore."

Respondents therefore assume, and have prepared this Brief on the assumption, that the sole Question presented by the Petitioners is:

> Whether it was error to grant a limited and partial summary judgment to the effect that the school district had failed to eliminate all vestiges of state-imposed segregation where that judgment was based on an extensive 143 page Joint Stipulation of Facts, the legal presumptions arising from which were never rebutted by proffer of any specific proof by the Petitioner.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provisions involved are Amendment XIV, Constitution of the United States—

> "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The Statute involved is Title 42, United States Code § 1983—

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights,

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[1] References to the Petition are noted as "P". References to the Appendix are noted as "P.A."

privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

The Statement of the Case is adequately, though briefly, set forth in the Petition. Such additions or corrections as may be necessary appear in the course of Argument.

ARGUMENT

PETITIONERS,[2] RAISE NO SUBSTANTIAL QUESTIONS. ON THE BASIS OF THE FACTS STIPULATED BY PLAINTIFFS AND DEFENDANTS, DEFENDANTS NEVER ELIMINATED ALL VESTIGES OF STATE IMPOSED SEGREGATION FROM THEIR SCHOOLS. DEFENDANTS NEVER PROFFERED, MUCH LESS PUT ON ANY PROOF OF SPECIFIC FACTS WHICH WOULD TEND TO REBUT THE PRESUMPTIONS ARISING FROM THE PROVEN FACTS CONTAINED IN THE JOINT STIPULATION AND THE GRANT OF LIMITED, AND PARTIAL, SUMMARY JUDGMENT WAS THEREFORE CORRECT. THERE IS NO CONFLICT IN ANY COURT DECISION ON THESE ISSUES.

I.

THE DECISION BELOW IS CLEARLY CORRECT

A. *The Stipulated Facts establish that the Defendants failed to Eliminate all vestiges of State Imposed School Segregation and that Plaintiffs were therefore entitled To some relief.*

The Defendants contend that the District Court erred in granting a limited, and partial, Summary Judgment based on the facts contained in a 143 page Joint Stipulation of Facts[3]

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[2] Petitioners are hereinafter referred to as the "Defendants", the "School District" or the "School Board." Respondents are hereinafter referred to as "Plaintiffs".

[3] J.A. 111a-254a. References to the Joint Appendix on Appeal filed in the Court of Appeals are noted as "J.A."

(P. 8). They do not, because they cannot, challenge the accuracy of those facts. Nor do they specify what precise facts they were precluded from raising below. This is no accident.

In this Court, as below, they merely allege, without specificity, that there exists proof "of a nature sufficient to overcome any presumptions" (P. 11) raised against them by the undisputed, because stipulated, facts. As discussion will show, defendants real complaint is not that they were foreclosed from offering proof in rebuttal, for they were not save but by the lack of any such proof. Their real complaint is that the grant of partial summary judgment resulted in *immediate* desegregation pursuant to this Court's mandate in *Carter v. West Feliciana Sch. Brd.*, 396 U.S. 290 (1970). To complain of inability to delay desegregation by frivolous and protracted litigation over issues not litigable in good faith is not a surprising complaint for a school system that managed to delay desegregation for 19 years. However understandable it might be for such a school system to entertain such a complaint, it hardly is enough to establish the impropriety of granting the summary judgment granted in this case.

The District Court's judgment was correct. Rule 56 of the F.R.Civ.P provides, in part, that "the judgment sought shall be rendered forthwith if . . . there is no genuine issue of material fact and . . . the moving party is entitled to judgment as a matter of law." The summary judgment granted was a limited, and partial,[4] one:

> . . ., plaintiffs' motion for summary judgment is hereby granted to the extent that that motion seeks a declara-

[4] Cf., F. R. Civ. P. 56(c), which provides, in part: "A summary judgment . . . may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages." See also F. R. Civ. P. 56(d).

> tion that the school system of Prince George's County does not, at the present time, meet the standards set forth . . . *(Brown I)* . . . and . . . *(Swann)*. Also in accordance with the said opinion, this Court holds sub curia all issues pertaining to the type and nature of relief which is required. (Citations Omitted) (P.A. 1a).

Two questions obviously govern the determination of the correctness of this limited, and partial judgment, viz, whether there existed any *genuine* issue of material fact, and, if not, whether plaintiffs were entitled to judgment, on the undisputed facts, as a matter of law.

There existed no genuine issue of material fact. The facts relied upon by the District Court were stipulated. The parties' Joint Stipulation consisted of more than 143 pages of factual and statistical data. Every fact material to decision of the issue before the District Court was contained therein, as becomes apparent when we consider what that precise issue was.

As the defendants conceded, by stipulation, and as they now concede in their Petition: "School districts in Maryland . . . were under State legislatively enacted laws that compelled school attendance on a racially segregated basis," (P. 2) at the time of this Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954) ("Brown I"). It was also stipulated that a current condition of segregated schools existed at the time suit was filed, as the following stipulated facts establish: (1) despite a system wide ratio of 22% black students, 130 of the 232 schools operated by the defendants (56%) had student bodies which were in excess of 90% black or in excess of 90% white (J.A. 236a); (2) 66% of all white students attended schools with student bodies in excess of 90% white (J.A. 236a); (3) 46% of all black students attended schools in excess of 90% black (J.A. 236a); (4) despite a system-wide 19% ratio of black to white

teachers, black teachers comprised 53% of all teachers at some schools with student bodies in excess of 90% black (e.g., Highland Park Elem., (J.A. 170a)) and as low as 2% of all teachers at some schools with student bodies in excess of 90% white (e.g., Laurel Jr. High (J.A. 182a)).

These undisputed, because stipulated, facts established that a current condition of segregated schools existed in a school system which had imposed segregation, by statute, in 1954. The issue for the District Court, therefore, was quite simple:

> "Rather, we have held that where plaintiffs prove that a current condition of segregated schooling exists within a school district where a dual system was compelled or authorized by statute at the time of our decision in . . . (Brown I) . . . the State automatically assumes an affirmative duty 'to effectuate a transition to a racially nondiscriminatory school system,' . . . 'that is, to eliminate from the public schools within their school system' all vestiges of state-imposed segregation. . . ."

Keyes v. Sch. Dist. No. 1, U.S. (1973) (Citations Omitted).

Although this quoted passage occurs in a case not directly applicable to this case, since it deals with school systems, which never segregated their schools by statute, it is but the most recent restatement of a long accepted principle, not challenged here by petitioners.[5] Because of the state imposed segregated school system that defendants concede existed, defendants were charged with ". . . the affirmative duty to take whatever steps may be necessary to convert to a unitary system in which racial discrimination would be eliminated

[5] We note that the self-described "Anglo-American" intervenors do seem to challenge this principle: . . . "respondents, as Anglo-Americans designated as a class, now challenge *Brown II* and *Swann* . . ." (Intervenors' Brief in Support of Petition, at 11). The insubstantiality of their position is sufficiently apparent that we do not discuss it.

root and branch . . .", *Green v. County Sch. Brd.*, 391 U.S. 430, 437 (1968), and ". . . to fashion steps which promise realistically to convert (the dual school system) promptly to a system without a 'white' school and a 'negro' school, but just schools." *Id.* 442.

The issue before the District Court therefore become one of determining whether the stipulated facts established the defendants failure to eliminate *all* "vestiges of state imposed segregation" from their school system. Or, to rephrase the precise issue decided by the District Court, whether the stipulated facts established the continued existence of at least *some* "vestiges of state imposed segregation." The District Court concluded that the undisputed, because stipulated, facts proved that defendants had failed to eliminate all such vestiges, or rephrasing it positively, that the undisputed facts proved that at least some vestiges remained present in the school system. As this conclusion was phrased by the District Court: ". . . the current lack of desegregation in the schools . . . stems from a pre-*Brown* I segregated system which has never been effectively dismantled . . . (P.A. 6a).

Before turning to discussion of the correctness of this conclusion, given the stipulated facts, it is important to note precisely what the District Court decided when it granted Summary Judgment, as well as to note carefully what it did not decide. The District Court did not decide that every school in the district which exhibited current segregation was unlawfully segregated. It did not decide that every school that exhibited current segregation had to be desegregated. It most emphatically did not decide that "every single school below ten percent Black or above fifty percent Black was . . . a 'one-race' school" which had to be desegregated, as the defendants here contend (P. 15). All the District Court decided, in granting the Summary Judgment granted herein, was that some "vestiges of state imposed segregation" re-

mained present in the school system. That this was all that the Court decided is evident when its Order and Opinion are read.

In its Opinion, the Court recognized that the defendants claimed that a dispute as to "causation" of the segregated conditions of at least some schools existed.

> "Against the agreed factual background in this case, defendants oppose plaintiffs' Motion for Summary Judgment, asserting that the undisputed facts constitute 'mere conclusions' and that a factual dispute concerning 'causation' exists. But that dispute, to the extent it exists herein,[6] is relevant not as to whether relief should be granted but rather as to what type of relief is required" (P.A. 5a).

The District Court in recognition of this "dispute" therefore held *sub curia* "all issues pertaining to the type and nature of relief which is required" (P.A. 1a).

In other words, as the Court's Order and Opinion make clear, all the Court decided, in granting Summary Judgment was that the stipulated facts established that at least some "vestiges of State imposed segregation" had not been eliminated and still existed. Since some such vestiges still existed, plaintiffs were entitled to some relief. However, since issues of causation might, as defendants asserted, exist, the extent and type of relief could not be decided until those issues were tried. Therefore, the Court did not decide the issue of "type and extent" of relief, but simply scheduled hearings thereon.

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[6] The Court's phrase "to the extent it exists herein" reflects the fact that defendants had merely alleged such an issue. They never specified precisely what "causation" facts they intended to prove, or which specific schools they claimed to present such an issue of "causation". The defendants only specific assertion of a "disputed" material issue of fact was that issue asserted once again in this Court, viz., that adoption of a desegregation plan in 1965 accomplished their duty to desegregate. See discussion, infra 10.

It is almost inconceivable that defendants can assert that they were precluded "from submitting proof . . . of a nature sufficient to overcome any presumptions" resulting from the stipulated facts, as a result of this Order. On its face, the Order not only did not so preclude them, but it, indeed, specifically invited such proof, with respect to any or all of the schools which exhibited a current condition of segregation. If, as defendants contend, proof existed that the current segregated condition of some, or most, of their schools resulted from factors beyond their control, and was therefore beyond the reach of a remedial order of the District Court, they could have, and were invited to, offer such proof at the remedial hearings. As we shall note, *infra* 18, the defendants chose not to attempt any such proof of "causation" at the remedial hearings.

The question whether the District Court's grant of Summary Judgment was correct therefore resolves itself into a simple one *viz*, whether the stipulated facts disclosed that plaintiffs were entitled to at least some relief because the facts established the continued existence of at least some vestiges of state imposed segregation. Review of the stipulated facts reveals that the only conclusion that can be reached is that at least some such vestiges existed and that plaintiffs were therefore entitled to at least some relief. The grant of partial Summary Judgment was therefore correct.

There follows a summary of the major and relevant facts contained in the 143 page Joint Stipulation of facts relied upon by the District Court in ruling that the dual system was never completely dismantled.

The defendant's school system consists of all public schools in Prince George's County, Maryland. It operates 232 schools with 162,828 pupils (J.A. 236a). Of this number, 36,450 (22.4%) are black and 126,378 (77.6%) are white (J.A. 236a).

Until 1954, the county maintained a dual school system segregated by law (J.A. 111a).

From 1954 until 1965, the county operated under a "freedom of choice" plan. Even the defendants concede that "freedom of choice" was ineffective to desegregate their schools (P. 14). In 1964-65, the last year of operation of the plan, over 82% of the district's black students attended schools which were 100% black and over 73% of the white students attended schools which were over 95% white (J.A. 218a).

The school district adopted a "geographic attendance zone" plan in 1965-66, which affected attendance patterns at 97 of the district's then 180 schools (J.A. 113a). The defendants claim in this Court, as they did below, that the "dispute as to a material issue of fact" which rendered the grant of partial Summary Judgment incorrect is "whether or not as a result of the Desegregation Plan as adopted by the Board of Education in 1965, the Petitioners did in fact complete or accomplish the affirmative duty to desegregate" (P. 21). This claim is incredible given the stipulated facts.

The 1965 plan left the dual system intact. After implementation, 141 of the districts' then 180 schools (79%) remained schools whose student bodies were in excess of 90% black or 90% white. Indeed, 124 of the 180 schools (69%) remained in excess of 95% white or 95% black (J.A. 236a). Granted, that the continued existence of some "small number" of one race schools is not inconsistent with discharge of the duty to desegregate. *Swann v. Charlottee-Mecklenburg Brd. of Educ.*, 402 U.S. 1 (1971). But, 79% of all schools is not some "small number."

The defendants do not dispute these facts. The defendants simply maintain that there were but a small number of one-

race schools left under the plan because, they claim, only "all-black" schools are to be considered "*one-race* schools of the type referred to in *Swann*" (P. 15). Thus, their "dispute" is not a factual dispute, of a type to prevent grant of partial Summary Judgment. Their "dispute" is a legal one — and an incorrect one, at that. It takes no elaborate citation to establish that the "substantially disproportionate" or "one-race" schools referred to in *Swann* includes schools which are all or virtually all white as well as schools which are all or virtually all black. The term is not merely limited to the 100% black school. *Cf, eg., Swann, supra; Wright v. City of Emporia* 407 U.S. 451 (1972).

The 1965 plan was ineffective for a number of reasons. First, it did not utilize pairing or grouping of schools or non-contiguous zones or restructuring of grade levels or transportation of pupils. The attendance zone maps in Stip. Ex. Nos. 3, 4, 5 show the zones to be contiguous. Stip. Ex. No. 49 (J.A. 150a) shows that transportation levels were not affected. Yet a desegregation plan that does not utilize these techniques and which leaves most schools racially segregated, in fact, is presumed invalid unless actual proof of the impracticability of their use is shown. *Davis v. Brd. of School Comm.*, 402 U.S. 33 (1971). The defendants never proferred any such proof in opposing the Motion for Summary Judgment.

These techniques were particularly necessary in this school district because of the defendants' school siting and construction policies. As these policies were described in the Joint Stipulation: ". . . of the 232 schools currently operated by the defendants, . . . 217, or 93.5%, were so sited and constructed that when they opened, they opened as schools which had student bodies which were racially disproportionate" (J.A. 146a).

The exhibits to the stipulation, upon which this statment is based, show that the defendants had opened 91 new schools in the 1954-65 period. Of these, 8 opened with a student body which was 100% black, 64 opened with a student body which was 100% white. (Source: J.A. 153a-198a). Thus, 87 of the 91 schools opened in the 1954-65 period (95%) were so sited and constructed that they opened as one-race schools.

The defendants do not, because they can not, deny these facts. They simply claim that engaging in such a pattern of school construction, with knowledge of its probable segregatory effect, is not inconsistent with discharging a duty to desegregate. ". . . [A]ll black municipalities do exist within Prince George's County and . . . construction of a public school to serve such a municipality is not of its own accord an act engendered by governmental discrimination" (P. 23). Thus, the defendants "dispute" is not a factual one — it is a legal one, and one, moreover, already foreclosed by this Court's Opinion in *Swann*. "It is the responsibility of local authorities . . . to see to it that future school construction and abandonment does not serve to perpetuate or re-establish the dual system." *Id*, at 21.

Thus, the defendants adopted a geographic attendance zone plan in 1965-66, which, when overlayed on a pattern of segregatory construction left over three-quarters of the district's schools as virtually one-race school. They do not dispute these facts. They do dispute the legal conclusion to be drawn from these facts, and claim that the 1965 plan, despite its segregatory effects, was a "*neutral assignment* policy" (P. 11). Again, their dispute is not factual, but legal, and incorrect, at that.

> "Racially neutral assignment plans proposed by school authorities . . . may be inadequate . . . when school authorities present . . . a 'loaded game board,' affirmative

> action . . . is proper . . . In short, an assignment plan is not acceptable simply because it is neutral." *Swann, supra*, 28.

This, of course, but restates the basic principle that the true measure of the adequacy of a desegregation plan is its effectiveness — not the intent with which it is, or is not, adopted. Cf, *Wright v. City of Emporia, supra.* The stipulated facts clearly establish the ineffectiveness of the 1965 plan, whether it was "neutral" or not.

In fact, however, the 1965 plan was not even "neutral." Thus, teacher assignments remained totally determined on the basis of race, with black teachers being assigned, in the main, to black schools, even after 1965. Thus, in 1965-66, the year after adoption of the plan, the percentage of teachers who were black in each school varied from as high as 98% in schools whose student bodies were 100% black (e.g., Fairmont Hgts Elem.) (J.A. 162a) to a low of 0% in schools whose student bodies were 100% white (e.g., Greenbelt Center Elem.) (J.A. 169a).

It strains credibility that defendants would urge that their 1965 plan effectively desegregated their schools, given these undisputed, because stipulated, facts.

From 1965 until 1972, the defendants continued to operate under their "geographic zones," changing from time to time, most, if not all, the boundaries of their schools. At all times, however, no fewer than 69% of their schools were in excess of 90% white or 50% black (J.A. 236a). At the time suit was filed 130 of 232 schools (56%) were in excess of 90% white or 90% black (J.A. 236a). 66% of the white students attended schools in excess of 90% white and 61% of the black students attended schools in excess of 50% black (J.A. 236a).

The continued operation of the school district as a dual system was more than a reflection of a mere failure to take affirmative action to convert to a unitary system. During the 1965-1972 period, the district continued to utilize its construction program, its boundary setting power and its teacher assignment policies to maintain racially identifiable schools.

Thus, the defendants opened 70 schools for occupancy during the 1965-72 period. Of these, 4 opened with 100% white student bodies, 26 opened with 95-99% white student bodies, 12 opened with 90-95% white student bodies, 2 with 95-100% black student bodies and 4 with 70-90% black student bodies. (Source: J.A. 153a-198a). In short, 48 of the 70 schools opened by the defendants during the 1965-1972 period (69%) were so sited and constructed that they opened as one-race schools.

During the 1962-72 school years, the opening of new schools required 409 boundary changes to be made at existing schools. Of these 409 boundary changes, only 36 (4%) were effected in a manner which reduced racial isolation in the affected schools. (Source: J.A. 147a and 200a-215a). During the same period, teacher assignments were also racial and effected so as to increase the racial identifiability of schools since black teachers were assigned, in the main, to schools whose pupil population was black (J.A. 155a-183a).

The defendants did adopt, in 1970-71, a "teacher desegregation" plan. However, at the time suit was filed, faculties were still racially identifiable. Thus, the percentage of teachers at each school who were black ranged from a high of 53% at some schools whose student bodies were in excess of 90% black (*e.g.*, Highland Park Elem.) (J.A. 170a) to a low of

2% black at some schools whose student bodies were in excess of 90% white (*e.g.*, Laurel Jr.) (J.A. 182a).

The effect of the defendants policies can be illustrated by the following stipulated facts. There were 118 schools which were in excess of 90% white when suit was filed. All 118 of these "white schools" had been "white schools" with overwhelmingly disproportionate white faculties and student bodies since the day they opened. Eighty-five of these white schools opened prior to 1965, before the defendants even claim to have desegregated. Yet despite their claimed "desegregation," all 85 remain what they always were: white schools. The other 33 were so sited and constructed and staffed with faculty that although they opened after 1965, i.e, after the defendants claim to have "desegregated," they opened with overwhelmingly disproportionate white student bodies and faculties.

The effect of the combination of siting, construction, boundary setting and teacher assignments is also obvious with respect to black schools. There were 44 schools in excess of 50% black when suit was filed. Three of these black schools were operated as "colored" schools prior to 1954, have always had disproportionately black student bodies and faculty and continued to exist as "black" schools when suit was filed.[7] Five of these were built in the 1954-1965 period to relieve overcrowding at, or replace, older "colored" schools and all

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[7] These schools are: *Fairmont Hgts. Elem.* (currently 99.8% black, opened in 1934 as a "colored" school; faculty was 100% black until 1964, never less than 72% black until 1971-72 when it was 45% black; Adjoins Dodge Park (14.5% black) and Cheverly-Tuxedo (15.8% black); *Highland Park Elem.* (currently 98.4% black; opened in 1928 as a "colored" school; faculty was 100% black until 1964, never less than 67% black until 1971-72 when it became 53% black); *Lakeland Elem.* (61% black, opened in 1928 as a "colored" school, adjoins Adelphi (8.6% black); Berwyn (1.9% black); Berwyn Hgts. (0.3% black); College Park (0% black); and University Park (2.6% black) (Source J.A. 153a-215a).

opened, and remain, disproportionately black.[8] Another twelve of these black schools were sited and constructed and opened as disproportionately black schools in the 1965-1972 period.

The 24 other schools which were in excess of 50% black when suit was filed opened as majority white schools.[9] Of these, however, 19 witnessed their substantial increase of black students as a result of (1) increasingly disproportionate assignments of black faculty to them, thus "racially identifying" them and (2) increasingly enlarged capacities and changes in attendance areas obviously designed to keep blacks moving into the area within those schools and out of surrounding white schools (Source: J.A. 153a-198a).

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[8] These schools are: *Fairmont Hgts. Jr. High* (currently 73% black, opened in 1965 to replace the "old" Fairmont Hgts. Jr.-Sr. which was a "colored" school, remained 100% black until 1970 when it became 74% black; Adjoins Bladensburg (14% black) and Duval (30% black)); *Mary Bethune Jr. High* (currently 60% black; opened in 1961 to replace the junior high functions of "Old" Fairmont Hgts. Jr.-Sr.; remained 100% black until 1970-71; adjoins Glenridge Jr. (11% black) and Bladensburg Jr. (5% black); *Beaver Hgts. Elem.* (currently 100% black; opened in 1965 to relieve overcrowding at Fairmont Hgts. and Bladensburg-Varnum, both "colored" schools. Adjoins Cheverly-Tuxedo (16% black)); *Glenarden Woods Elem.* (currently 99% black; opened in 1960 to relieve overcrowding at all black Lincoln Elem., a pre-1954 "colored" school; faculty never less than 68% black until 1970-71, when it reduced to current 44% black; adjoins Dodge Park (14% black), West Lanham Hills (10% black), and J. McHenry (43% black); *Orme Elem.* (currently 83% black, opened in 1956 as replacement for "colored" Aquasco Elementary; adjoins Baden (37% black)).

[9] The Petition contains an apparent typographical error: "The Joint Stipulation of Facts denoted that there are forty three schools . . . today which . . . were at one time . . . majority "white" (P. 15a). The figure must be intended to be twenty four, not forty-three (See Joint Stipulation at J.A. 134a, 153a-198a).

We also note an error in our Brief in Opposition to the related Petition of intervenors in No. 1428. At page 8, we indicate that 21, rather than 24, of these schools opened as majority white and that 23, rather than 20, opened as majority black. The transposition of these 3 schools was incorrect.

Ardmore Elementary is an excellent example of the "tipping" or segretatory effect of the combination of policies followed by the defendants. Ardmore is a school that is now 96% black. It opened in 1960 with an all white enrollment of 159 students and an all white faculty. As the black population increased, so did its capacity and its black faculty. The faculty became 25% black in 1965-66, 49% black in 1967, and 79% in 1970. Its enrollment went from 159 in 1960 to 303 in 1964-65, at which time it was 28% black. In 1965-66, its enrollment was dramatically increased to 511, and its racial composition drastically altered to 60% black. As the black percentage of students (and faculty) increased, so did its capacity, and it now enrolls 647 students, 96% of whom are black. Ardmore adjoins Kettering (3.6% black) Woodmore (36% black); Glen Dale (13% black); Seabrook (11% black) and J. McHenry (43.3% black) (Source: J.A. 153a-198a).

Faced with these undisputed, because stipulated, facts, the District Court granted a partial Summary Judgment, the effect of which, since it kept open the "nature and extent of relief" was that the Court had concluded that the defendants had failed to eliminate at least some vestiges of State imposed school segregation. The District Court was correct.

At a very minimum, the continued operation of the 9 black schools built as "colored" schools prior to 1954 or as replacements for "colored" schools which were closed prior to 1965 were "vestiges of state imposed segregation." So, too, was the continued operation of the 85 "white" schools which had been opened as white schools with white faculties prior to 1965 and which continued to operate as virtually all white schools. In addition, the defendants very practice of assigning racially disproportionate faculties to their schools in accordance with the racial characteristics of their student bod-

ies as well as their admitted practices of siting and constructing schools to serve segregated neighborhoods, with full knowledge of the segregatory potential of these acts, entitled plaintiffs to some relief. It was not error to grant the partial, and very limited, Summary Judgment granted herein.

B. *The Petitioners Never Proffered any Specific Facts in Rebuttal of the Presumptions Arising by Reason of the Stipulated Facts, Despite Repeated Opportunity to do so.*

There is yet further reason to affirm the District Court's grant of partial Summary Judgment. Not only do the undisputed facts clearly demonstrate the ineffectiveness of the prior Board policies, but, indeed, the defendants themselves failed to raise any material, disputed facts which might alter this conclusion.

On a motion for Summary Judgment, the moving party is "entitled to any presumption that is applicable to the facts before the court." 6 MOORE'S FEDERAL PRACTICE, 56.15 [3] (1971). In this case, as *Swann, supra*, 26, makes clear, the material facts contained in the Joint Stipulation entitle plaintiffs, at the minimum, to a presumption that the defendants never dismantled their dual school system and that at least some of the present segregation is therefore a "vestige" of their dual school system.

In such a case, if the opposing party fails to come forward with any countervailing proof, in the form of specific facts, the court may properly invoke this presumption and grant summary judgment. *Engl. v. Aetna Life Ins. Co.*, 139 F. 2d 469 (2nd. Cir. 1943). See also 6 MOORE'S FEDERAL PRACTICE 56.11 [47] (1971).

In this case defendants totally failed to raise any material specific facts which were in dispute. Defendants filed but

two affidavits in opposition to plaintiffs' motion and affidavits: one by the Board's Pupil Placement Officer (the "Wendorf" affidavit) (J.A. 66a) and the other by the Board's Real Estate Officer (the "Floyd" affidavit) (J.A. 51a). After filing, the parties discussed the content of all the materials filed and incorporated most of the material contained in the parties' affidavits, along with other facutal material not in dispute, into the Joint Stipulation of Facts. The material contained in the defendants' affidavits was, for the most part, incorporated in that Stipulation — obviously no dispute exists as to these facts. Thus, of the facts contained in the 32 paragraph Wendorf affidavit, all but the material alleged in paragraphs 1-5 and paragraphs 25 and 26 were, with editorial and typographical corrections, incorporated in the stipulation. Paragraphs 1-5 were excluded because they simply set forth the affiant's personal background and qualification. Similarly, all the material contained in the Floyd affidavit, except for that contained in paragraphs 1-6 (personal background and qualifications) and paragraph 24 was incorporated in the Stipulation, with minor editorial and typographical corrections.[10]

Thus, no dispute can be said to exist with respect to the bulk of facts raised by defendants in opposition to plaintiffs' motion. And, as the district court properly concluded, the agreed upon facts, including the facts originally filed in defendants' affidavits and later incorporated in the Stipulation, leave no doubt about the defendants' failure to desegregate.

[10] After the Stipulation was filed, no further factual material was filed by either side, although counsel for both sides did file memoranda in support of, or in opposition to, the plaintiffs' motion. Cf., F. R. Civ. P. 56(e): "[A]n adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits . . ., must set forth specific facts showing there is a genuine issue for trial."

As to those "facts" originally filed in affidavit form, but not incorporated in the Joint Stipulation, one need merely read them to conclude that they are self-serving and conclusory. They are not such as to prevent summary judgment.

> "Mere formal denials or general allegations which do not show the facts in detail and with precision are insufficient to prevent the award of summary judgment." *Proctor v. Sagamore Big Game Club*, 265 F. 2d 196 (3 Cir. 1959). See also *Robin Construction Company v. United States*, 345 F. 2d 610 (3 Cir. 1965); *DeLuca v. Atlantic Refining Co.*, 176 F. 2d 421, 423 (2 Cir. 1949); 3 BARRON & HOLTZOFF, FEDERAL PRACTICE, § 1235.1.

Especially so is that rule applicable to this case in which plaintiffs are entitled, at the very least, to a strong constitutional presumption. Indeed, the lack of any proof that the defendants have effectively desegregated their system, in whole or in part, is apparent when we consider that the defendants failed to produce any such evidence at all at the hearings scheduled by the District Court on the issues not decided by it when it granted partial summary judgment, *viz.* "the type and nature of relief."

Defendants apparently do not dispute that the burden of proof was theirs, by virtue of this Court's holding in *Swann*. See Petition at 11, 15. They claim, incredibly, however, that they were given no opportunity to rebut the presumptions raised by the stipulated facts.

If the defendants honestly believed, as they now contend, that an issue of "'*defacto*' or '*dejure*' segregation" (P. 15) existed in the case, or that the current segregation at some or all their schools resulted from factors beyond their control and therefore beyond the power of the district court to remedy, they had the opportunity to litigate such an issue and offer such proof at the remedial hearings scheduled by the Court for that specific purpose.

The defendants chose not to attempt any rebuttal of the presumption warranted against all their substantially disproportionate schools due to "the need for remedial criteria of sufficient specificity to assure the school authorities compliance." *Swann, supra,* at 26. Given the facts of this case, it would have proven futile for them to have attempted to do so. Perhaps that best explains their decision not to attempt any rebuttal. Be that as it may, the important point is that they chose not to attempt to prove that the current segregation at any of their racially disproportionate schools was beyond the court's remedial power.

Instead, they filed, with the district court, a unanimously approved resolution of the Board in which the Board stated it would remedy the current segregation at *all* its racially disproportionate schools, without exception. The resolution read, in part, as follows:

> "It was moved by Dr. Robertson, seconded by Mrs. Wolf, that this Board directs the Superintendent and staff to proceed immediately to the completion of plans for the desegregation of the Prince George's County School System in compliance with the order of the United States District Court for the District of Maryland, July 25, 1972, specifically:
>
> 1. That the staff proceed immediately to develop plans for desegregation of the County's secondary schools, under the following guidelines and constraints:
>
> a. Each school shall reasonably reflect the overall composition of the county school system, and in no circumstance shall any school have a majority of a minority race. Specifically, the attainment of a standard of not more than 35% black student body is deemed to be the optimum practical means of achieving such results." (J.A. 281a)

By their acts, therefore, the defendants admitted they had no proof, or, at least that they chose to present no proof, on

the issue of "*defacto* or *dejure*" with respect to any of their schools, but would instead remedy all of the segregation at all their schools. This resolution was the Board's voluntary action. It was not ordered by the District Court — indeed it went well beyond the court's summary judgment order which clearly left open the question of "the type and nature of relief" to be granted. Had there really been proof of the sort they now vaguely hint exists, it could have been offered.

Not only did the defendants adopt this resolution, but they never thereafter requested that any of their segregated schools be exempt from a desegration plan nor did they proffer, much less actually put on, any evidence, at all, to exempt some or all their schools. Instead, the principal focus of the defendants efforts at all the remedial hearings was *not* to prove that some, or most, of the segregation in their schools was innocent; rather, their efforts were focused on gaining delay in implementing the plans they designed.

Thus, at the August remedial hearings, the defendants presented the desegregation plan broadly outlined in the Board's resolution and the detailed plans for the senior high portion of the plan. Each and every live witness, over a five day trial, who testified on their behalf, thereafter testified for the purpose of justifying delay in implementing their plan. Not a single one testified that the plan went too far in remedying "defacto" segregation.

And so it went at all subsequent hearings. At the December remedial hearings, the defendants efforts were, once again, focused on delay. The district court had ordered the Board to submit the detail planning for the desegregation plan outlined in its August resolution on December 4, 1972. On December 4 and 7 the defendants submitted four outlines of alternative plans. Despite the court's August order, however, no details were given for any of the plans except for

Plan I, and that only with respect to secondary schools (12-29-72 opinion at P.A. 14a). The school board's attorney stated that the plans denominated as Plan III (based on reducing the racial composition of but eight black schools to 35% black) and Plan IV (based on voluntary transfers) were not being recommended to the court, and that the school board was only submitting and recommending Plan I for secondary schools and Plan II for elementary schools for the court's approval (Trans. 12-4-72 at 159-60). Plan I was based on the 35% goal adopted by the school board in its August resolution and required the transfer of 84,000 students (Trans. 12-4-72 at 191). The outline of Plan II stated that it was based on reducing majority black schools to 40%, but no details were given. The court indicated that it did not oppose such goals but criticized the inflexibility of fixed rations and the apparently high number of transfers required by the plans recommended by the Board (12-4-72 Trans. at 178-91). The court ordered the defendants to continue to work on completing the details of a plan and suggested that the defendants be more flexible and that they be concerned with reducing the number of student transfers and with eliminating one-race schools, and less concerned with achieving specific "racial balances" in their schools. (See 12-13-72 opinion at P.A. 41a.)

Neither the defendants nor the intervenors ever proffered any proof on the issue which they now seek to litigate at the hearings specifically scheduled to determine "the type and nature of relief". The record is entirely barren of any suggestion by the defendants that their own desegregation plans went too far because they remedied too much. In summary, defendants now complain that they were precluded from offering evidence on an issue for the determination of which the district court specifically scheduled hearings and at which the defendants themselves declined to litigate the issue. Hav-

ing declined to do so, rather than having been precluded fr
doing so, it hardly is now the time, after implementation
the plan designed by their own staff, to complain that t
issue really is litigable.

CONCLUSION

For the foregoing reasons it is respectfully submitted th
this petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this day of Octob
1973, two copies of the foregoing Brief were mailed, posta
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CERTIORARI DENIED